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IN THE

Supreme Court of the United States

October Term, 1951

No. .....

CURTISS C. STRAUB and MIRIAM I. STRAUB,

Petitioners,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estates of CURMAR MANUFACTURING COMPANY, a Copartnership, etc., and CURTISS C. STRAUB and MIRIAM I. STRAUB,

Respondent.

Petition for Review on Writ of Certiorari of Decision of United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Curtiss C. Straub and Miriam I. Straub pray that a Writ of Certiorari issue to review the order and judgment entered December 27, 1951, in the United States Court of Appeals for the Ninth Circuit, Case No. 12676, entitled "Paul W. Sampsell, as Trustee in Bankruptcy for the Estates of Curmar Manufacturing Company, a copartnership, etc., and Curtiss C. Straub and Miriam I. Straub, Appellant, v. Curtiss C. Straub and Miriam I. Straub, Appellees" and respectfully represent as follows:

Basis Upon Which It Is Contended That This Court Has Jurisdiction to Review the Judgment or Order in Question.

This is a petition for writ of certiorari to the United States Court of Appeals for the Ninth Circuit, and is brought before this Court under the provisions of Section 24-c of the National Bankruptcy Act (11 U. S. Code, Sec. 347) and Title 28, United States Code, Section 1254 and Section 2101c.

The jurisdiction of the District Court was invoked by the filing of the voluntary petition of the partnership and of the individual bankrupts in the United States District Court for the Southern District of California, Central Division. (Bankruptcy Act, Sec. 2, Sub. 1.) The jurisdiction of the Referee in Bankruptcy was invoked by the General Order of Reference in each of these cases. (Bankruptcy Act, Sec. 38.) Jurisdiction of the District Court on Review is covered by Section 2a, Subdivision 10, of the National Bankruptcy Act, Section 39c, of the same Act. The jurisdiction of the United States Court of Appeals for the Ninth Circuit was invoked under Section 24 of the National Bankruptcy Act.

Summary and Short Statement of Matter Involved.

On February 21, 1948, Curtiss C. Straus and his wife, Miriam I. Straub, petitioners herein filed their voluntary petitions in Bankruptcy in the United States District Court for the Southern District of California, and in their schedules claimed as exempt certain real property covered by a declaration of homestead executed by them prior to the filing of their petitions in Bankruptcy. The Declaration of Homestead, however, was not recorded in the office of the County Recorder of Los Angeles County

until three days after the filing of the petition in bankruptcy. The Declaration of Homestead was executed in accordance with the provisions of the statutes of California, and in so far as the content and execution thereof is concerned was regular and in conformity with the said statutes. From a time prior to the execution of said Declaration of Homestead, and at all times thereafter the bankrupts, petitioners herein, and their minor children resided on the property covered by the Declaration of Homestead. The value of the property was within the homestead exemption. Save and except for the fact that the Declaration of Homestead was recorded after the filing of the petitions in bankruptcy, it is admitted that the homestead so sought to be embraced would have been a good and valid homestead. Paul W. Sampsell, as trustee of the respective bankrupt estates, refused to set the property apart as exempt, stating as his reason that said Declaration of Homestead was not of record at the date of bankruptcy. The bankrupts filed objections to the trustee's report and a petition that an order be made setting apart the property as exempt. On hearing the Referee in Bankruptcy confirmed the report of the trustee, and denied the petition of the bankrupts. The Honorable Judge of the District Court on review of the order of the Referee reversed the order of the Referee, and directed that the property as the homestead of the bankrupts be set apart as exempt. His opinion is set out on pages 42 to 48 of Transcript of Record. An appeal was taken to the United States Court of Appeals for the Ninth Circuit by the Trustee in Bankruptcy, and on May 22, 1951, the said Court of Appeals affirmed the judgment of the United States District Court. The opinion of the United States Court of Appeals for the Ninth Circuit

under the title "Sampsell v. Straub, *et ux*" is reported in 189 F. 2d 379, and is set out in the Transcript of Record at pages 71 to 78.

A petition for rehearing was filed by the trustee in bankruptcy, which petition was granted. Upon rehearing the Court of Appeals for the Ninth Circuit vacated its order confirming the judgment of the District Court, and reversed that judgment. The opinion of the Appellate Court has not as yet been reported, but is set forth in the Transcript of Record at pages 80 to 86.

The principal point involved in the two opinions of the Court of Appeals was the proper characterization of the lien obtained in California by voluntarily recording an abstract of judgment. In its first opinion, the Appellate Court held that, since in California the judgment itself did not constitute a lien, but could be made a lien only by the voluntary and optional act of the holder thereof in recording an abstract of judgment, the Trustee under Section 70c of the Bankruptcy Act held no lien by "legal or equitable proceedings" that would enable him to defeat the homestead. In its second opinion, the Court receded from that position, saying that the meaning of a "legal or equitable proceeding" under Section 70c was not clear, and if the language stood alone in that section, it would not be disposed to change its ruling, but concluding that the same or similar language in Section 3a(3) and Section 67a of the Bankruptcy Act required a different construction in those sections held that the California judgment lien, though perfected only by voluntary recordation is a lien by "legal or equitable proceedings" within the meaning of Section 70c, and that such judgment lien so held by the Trustee would defeat the homestead right of the bankrupt.

Questions Presented.

I.

DOES THE CONSTRUCTION GIVEN SECTION 70c BY THE COURT OF APPEALS NULLIFY EXEMPTION RIGHTS GIVEN BY CALIFORNIA AND BY CONGRESS?

II.

IS A JUDGMENT LIEN THOUGH PERFECTED ONLY BY VOLUNTARY RECORDATION IN AN OFFICE SEPARATE AND APART FROM THE COURTS A LIEN BY "LEGAL OR EQUITABLE PROCEEDINGS" WITHIN THE MEANING OF SECTION 70c OF THE NATIONAL BANKRUPTCY ACT, OR WITHIN THE MEANING OF SECTION 3a(3) AND SECTION 67a OF THE NATIONAL BANKRUPTCY ACT?

III.

IS IT NOT TRUE THAT THOUGH THE NATIONAL BANKRUPTCY ACT CONFERS ON THE TRUSTEE BY VIRTUE OF SECTION 70c THE STATUS OF A HOLDER OF A LIEN BY "LEGAL OR EQUITABLE PROCEEDINGS" THAT THE LAW OF THE STATE WHERE THE STATUTE IS INVOKED AS AN AID TO THE TRUSTEE IS DETERMINATIVE OF WHAT CONSTITUTES A "LIEN BY LEGAL OR EQUITABLE PROCEEDINGS"?

IV.

WAS IT ERRONEOUS TO MAKE THE MEANING OF "LEGAL OR EQUITABLE PROCEEDING" IN RESPECT TO SECTION 3a(3) AND SECTION 67a THE CRITERION AS TO ITS MEANING UNDER SECTION 70c?

V.

CAN PREVIOUS DECISIONS OF THIS HONORABLE COURT, SUCH AS MYERS V. MATLEY, 318 U. S. 622, PROTECTING THE HOMESTEAD OF FAMILIES AGAINST SEIZURE AND SALE BY CREDITORS BE REVERSED OR IGNORED BY THE COURT OF APPEALS?

Reasons Relied Upon for Allowance of Certiorari.

I.

The decision of the Court of Appeals in this case will nullify rights of homestead exemptions given debtors under the law of California and states having similar laws, all contrary to the intent of Congress that the Bankruptcy Act shall not affect the allowance to the bankrupt of exemptions prescribed by laws of the different states.

II.

In deciding that a judgment lien, though perfected only by voluntary recordation is a lien by "legal or equitable proceedings" within the meaning of Section 70c of the Bankruptcy Act the Court of Appeals for the Ninth Circuit has decided a question of great importance which has not been and should be settled by this Court. This is likewise true as to its similar holding with respect to Section 67a and Section 3a(3) of the National Bankruptcy Act.

Said ruling has likewise so far departed from the accepted and usual definition of "legal or equitable proceeding" as to call for an exercise of this Court's power of supervision.

The ruling is vital not only with respect to homestead exemptions but also with relation to the institution of bankruptcy proceedings and the validity of thousands of transactions in cases where bankruptcy has occurred.

III.

The Court of Appeals for the Ninth Circuit admitted that the decision was counter to the decisions of the highest California court that the recordation of an ab-

stract of judgment should be distinguished from a judicial proceeding. The Court of Appeals should have been governed by the said State Court decisions in that while Section 70c confers on the trustee the status of a holder of a lien by "legal or equitable proceedings," it is evident that the hypothetical status depends for meaning on a substantive law not explicitly indicated, but which it incorporates by reference, which law is the state law where the rights of the trustee are being invoked.

IV.

The Court of Appeals for the Ninth Circuit in admitting that the assertion of the status of a California judgment lienor by the trustee is not essential to the primary objective of Section 70c should not have expanded the meaning of Section 70c to give him that status to defeat the homestead. It thereby so far departed from the accepted and usual judicial rule of liberal interpretation in favor of exemption rights and the rights accorded the bankrupt in respect to exemptions and a new start in life with exemptions to which he might be entitled, as to call for an exercise of this Court's supervision.

V.

In making the meaning of "legal or equitable proceedings" in respect to Section 3a(3) and Section 67a of the National Bankruptcy Act, the criterion as to its meaning in Section 70c, the Court of Appeals of the Ninth Circuit has ruled in a way probably in conflict with the holding of this Court in *Citizens Bank v. Ravenna Bank,* 234 U. S. 360.

VI.

Since a California judgment lien is not one obtained by legal or equitable proceedings," the facts of this case

make it fall squarely within the rule established by *Myers v. Matley,* 318 U. S. 622, requiring that a homestead be allowed, and consequently in reversing the judgment of the lower court that the homestead should be set aside, the Court of Appeals for the Ninth Circuit was in conflict with the decision of this Court in *Myers v. Matley, supra,* and that decision which protects the homes of families from seizure and sale is ignored and homestead exemption rights are swept aside.

Your petitioners annex hereto their brief in support of their petition.

Wherefore, your petitioners pray that a writ of certiorari may issue under the seal of this Court, directed to the United States Court of Appeals for the Ninth Circuit to the end that this case may be reviewed and determined by this Court as provided by law, and that the judgment of the said court may be reversed by this Honorable Court, and the judgment of the United States District Court affirmed, and that these petitioners may have such other and further relief as may seem meet and proper.

Respectfully submitted,

CHARLES K. CHAPMAN,
ALAN E. GRAY,
Attorneys for Petitioners.

KYLE Z. GRAINGER,
GRAINGER, CARVER & GRAINGER,
Of Counsel.

Certificate of Counsel.

I, Alan E. Gray, a member of the bar of this Court, hereby certify that I believe the foregoing Petition for Writ of Certiorari is well founded and meritorious, and is not interposed for the purpose of delay.

ALAN E. GRAY.

IN THE

Supreme Court of the United States

October Term, 1951

No.....

CURTISS C. STRAUB and MIRIAM I. STRAUB,

Petitioners,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estates of CURMAR MANUFACTURING COMPANY, a Copartnership, etc., and CURTISS C. STRAUB and MIRIAM I. STRAUB,

Respondent.

BRIEF IN SUPPORT OF PETITION.

A statement of the grounds on which the jurisdiction of this Court is invoked, a concise statement of the case, a reference to the opinions delivered in the courts below, the questions presented, and the reasons relied upon for the allowance of certiorari are all set forth in the Petition for Review on Writ of Certiorari to which this brief is annexed, and by reference are made a part of this brief.

ARGUMENT.

I.

Nature and Importance of Case.

The proper decision in this case revolves around the meaning to be accorded "a lien by legal or equitable proceedings" under Section 70c of the National Bankruptcy Act, which provides that the trustee with reference to the property in his possession as trustee at the time of bankruptcy shall have "all the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such creditor actually exists." Unless, under such section the trustee in this California bankruptcy proceeding is accorded such lien as a judgment creditor holds who has recorded an abstract of a judgment held by him with the County Recorder, *Myers v. Matley,* 318 U. S. 622, requires that the homestead of the Straubs be set apart to them as exempt. The law of California, and the law of Nevada, where the *Myers v. Matley* case arose, in respect to homesteads are of like nature in that a declaration of homestead must be recorded to prevent levy and sale of property on execution. In Nevada the declaration of homestead may be filed at any time prior to the sale under execution. In California likewise the declaration of homestead may be filed at any time before sale under execution, save and except that it would not prevent such sale where the judgment upon which the execution was issued constitutes a lien on the property claimed as a homestead.

Beaton v. Reid, 111 Cal. 484;

Yager v. Yager, 7 Cal. 2d 213.

In the latter case it is said, at page 217:

> "A declaration of homestead may be filed during the pendency of litigation, at any time before the judgment has become a lien upon the property. It may be filed subsequent to the rendition of the judgment. (Beaton v. Reid, 111 Cal. 484 (44 Pac. 167); Simonson v. Burr, 121 Cal. 582 (54 Pac. 87); Eby v. Foster, 61 Cal. 282.) It will defeat an existing attachment lien. (Lucci v. United Credit & Collection Co., 220 Cal. 492 (31 Pac. (2d) 369); Jacobson v. Pope & Talbot, 214 Cal. 758 (7 Pac. (2d) 1017).) It may be filed after levy of execution, and provided there is not a valid and subsisting judgment lien on the property, it is not subject to execution sale except upon proceedings had under sections 1245-1259 of the Civil Code, for reaching the excess in value above the homestead exemption of $5,000.00. (Beaton v. Reid, *supra.*)"

In its first decision, 189 F. 2d 379, the Court of Appeals in this case influenced by two circumstances, namely, that the recordation of an abstract of judgment is a voluntary optional act of the holder of a judgment and by the fact that the highest courts of California have held that the recordation of an abstract of judgment should be distinguished from "judicial proceedings" under California law,

Coley v. Hecker, 206 Cal. 22;

Gudger v. Manton, 21 Cal. 2d 537;

held that the trustee in this case did not occupy the status of a holder of a judgment lien, and consequently that the District Court in setting aside the homestead as exempt properly applied the rule of *Myers v. Matley* to the circumstances of the case. On rehearing the Court concluded that it was in error, the Honorable Judges thereof saying that if Section 70c stood alone they would not be disposed to disturb their former decision, but that under Section 3a(3) and Section 67a of the Bankruptcy Act, identical or equivalent language appeared, and that under those sections, it would be incumbent upon them to hold that a California judgment lien was a lien obtained by legal or equitable proceedings, and that while the primary purpose of Section 70c did not require that the trustee be given the status of the holder of a judgment lien that it was consistent with such objective of said section to give him that statuts, and that consistency in the construction of similar phrases appearing at different places in the Bankruptcy Act should be observed. Consequently the Court ruled that under Section 70c the trustee did possess rights, remedies and powers of the holder of a judgment lien, and reversed the judgment of the District Court setting apart the homestead. This decision which we claim is erroneous has given rise to a number of questions which we think should influence this Court to grant a writ of certiorari.

The decision is far reaching in that the construction given to the meaning of Section 70c by the Court of Appeals will nullify the rights of homestead exemptions

given debtors under the law of California and states having similar laws, all contrary to the intent of Congress that the Bankruptcy Act shall not affect the allowance to the bankrupt of the exemptions prescribed by the laws of the different states. This will affect untold numbers of homes of families presumably protected by these homestead laws and the Acts of Congress.

Furthermore, the construction given to the said section by the Court of Appeals and the construction given to Sections 3a(3) and 67a of the Bankruptcy Act are entirely at variance with decisions of this Honorable Supreme Court and other Courts of Appeal to the effect, in respect to those sections, the state law shall govern as to the existence or nature of a lien. If under said state law such lien exists, then such results will follow therefrom as the bankruptcy act prescribes. Therefore, the proper decision in this case is vital not only with respect to homestead exemptions, but also with relation to the institution of bankruptcy proceedings and the validity of thousands of transactions in cases where bankruptcy has occurred.

The proper decision will be of especial importance not only in California, but also in other states such as New Mexico, Connecticut, New York, Louisiana, Texas, Oregon, Arizona, Alabama and West Virginia, which states have similar provisions in one phase or another requiring the recordation of a transcript or abstract of a judgment before such judgment can become a lien on real property.

II.

The Construction Given Section 70c by the Court of Appeals Nullifies Exemption Rights Given by California and by Congress.

In California until a creditor has sued and served the debtor; until the debtor's time to answer has expired, and default has been entered, or if the debtor contests until the time of trial and final judgment, and even past an attachment and past a judgment the debtor may homestead his property, thereby protecting it against claims of creditors. But the bankruptcy law, as construed in the Court of Appeals' opinion on rehearing, cuts off this right and in effect gives the creditors by filing a petition in bankruptcy the power to nullify the state law and the state policy as to exemptions, notwithstanding Section 6 of the Bankruptcy Act provides that the act shall not affect the allowance to bankrupts of the exemptions which are prescribed by state laws. In so construing Section 70c of the Bankruptcy Act, the Court of Appeals in its opinion indicated that if Section 70c stood alone, it would adhere to its former opinion that was set aside on rehearing. The Court receded from the position taken by it in its first opinion, only because it felt that other sections of the act involving similar or identical words required a different construction than that given to those words in their first opinion. In this brief, we shall later point out that the Court was in error in its construction as to the meaning of the term "legal or equitable proceedings" in those sections taken as the

criterion to be followed in respect to Section 70c. Be that as it may, however, uniformity of construction should not be obtained at the price of frustration of legislative intent.

This Court in *Stellwagen v. Clum*, 245 U. S. 606, at page 617, said:

> "The federal system of bankruptcy is designed not only to distribute the property of the debtor, not by law exempted, fairly and equally among his creditors, but as a main purpose of the act, intends to aid the unfortunate debtor by giving him a fresh start in life, free from debts, except of a certain character, after the property which he owned at the time of bankruptcy has been administered for the benefit of creditors. Our decisions lay great stress upon this feature of the law as one not only of private but of great public interest in that it secures to the unfortunate debtor, who surrenders his property for distribution, a new opportunity in life. Neal v. Clark, 95 U. S. 704, 709; Traer v. Clews, 115 U. S. 528, 541; Hanover National Bank v. Moyses, 186 U. S. 181, 192; Wetmore v. Markoe, 196 U. S. 68, 77; Burlingham v. Crouse, 228 U. S. 459, 473."

This Court in respect to Section 67f of the Bankruptcy Act (now Section 67a), dealing with nullification of liens obtained by legal or equitable proceedings, also said in *Chicago, Burlington & Quincy Railroad Co. v. Hall*, 229 U. S. 511, at page 515:

> "This view, we think, is supported by the language of the section and the general policy of the act which

> was intended not only to secure equality among creditors, but for the benefit of the debtor in discharging him from his liabilities and enabling him to start afresh with the property set apart to him as exempt. Both of these objects would be defeated if judgments like the present were not annulled, for otherwise the two Iowa plaintiffs would not only obtain a preference over other creditors, but would take property which it was the purpose of the Bankruptcy Act to secure to the debtor."

It is not unusual that the same or similar terms be interpreted differently where occurring in different sections of the same act. In *Atlantic Cleaners & Dyers v. United States,* 286 U. S. 427, the identical words "Trade and Commerce" occurring in different sections of the Sherman Act did not receive the same construction. In that case the Court pointed out that any presumption of identical meaning readily yields to meet the purposes of the law.

The Court of Appeals in the present case recognized that its holding was not essential to the primary objective of Section 70c, but failed to take into consideration that its holding made Section 70c a sword to be used against the exemption rights contrary to the purpose of the bankruptcy act. The Court of Appeals should not have sacrificed the purpose of the act as it did.

III.

A Judgment Lien Perfected Only by Voluntary Optional Recordation in an Office Apart From the Courts Is Not a Lien by a "Legal or Equitable Proceedings" Within the Meaning of 70c of the Bankruptcy Act or Within the Meaning of Sections 3a(3) and 67a of the Bankruptcy Act.

The Court of Appeals in its first opinion and decision held that the lien acquired by the voluntary recordation of an abstract of judgment with the County Recorder is not a lien obtained by legal or equitable proceedings. In receding from that position in its second opinion and decision we feel that the Court of Appeals was in error in that it did not give force to the judicially accepted concept of what constitutes a legal or equitable proceeding; and secondly, in that it did not give due force to the decisions of the highest Court of California as to what constitutes such a proceeding. In connection with what we claim is the first point of error, the Court of Appeals said in its original opinion, thereafter vacated on rehearing:

> "In natural connotation the words 'by legal or equitable proceedings' suggest a lien which attaches by force of judicial process. Moreover, it is in terms and conception consistent with this construction that the rights of trustees under this provision have been adjudicated in all of the cases which have come to our attention.
>
> "No alternative construction has been suggested which would give meaning to the phrase in question."
>
> *Sampsel v. Straub,* 189 F. 2d 379.

It is true, of course, that a judgment is obtained by legal or equitable proceedings, but that is not to say that a judgment lien is obtained by such proceedings. A lien of a judgment is purely a creature of statute, no such lien having existed at common law.

Hertweck v. Fearon, 180 Cal. 71;

Morsell, et al. v. First National Bank, 91 U. S. 358.

In *Jeffrey v. Moran,* 101 U. S. 286, at page 288, it is said:

> "No reasoning can successfully maintain that a claim merely in judgment and a judgment lien are the same thing in legal effect any more than in fact. To hold otherwise, should be to make the law and not simply to apply it."

It was said in *In re Emslie, et al.* (C. C. A. 2d, 1900), 102 Fed. 291, at pages 293-294:

> "Legal proceeding is any proceedings in a court of justice by which a party pursues a remedy which the law affords him. The term embraces any of the formal steps or measures employed in the prosecution or defense of a suit. In the section it obviously refers to the use of judicial process, the phraseology being 'levies, judgments, attachments, or other liens obtained through legal proceedings.' The filing of notice of a mechanic's lien has no necessary relation to the initiation or the prosecution of a suit. The filing is essential in order to maintain the action to foreclose the lien, because otherwise the lien does not attach; but it is no more a preliminary step in the suit than is the protesting of a note in a suit against the indorser. It is a proceeding of the same kind as filing a chattel mortgage or recording a deed."

Later in the decision, the Court, in speaking of the mechanic's lien law of Michigan and New York, says, at page 295:

> "In both it is wholly optional with the lienor whether he will avail himself or not of his priority."

In *In the Matter of Rialto Properties Co., Debtor* (U. S. D. C., No. Dist. of Calif.), 26 A. B. R. (N. S.) 505, at page 509, 8 Fed. Supp. 57, it is said:

> "The words 'Legal Proceedings' used in subdivision 3 of Section 3 have reference to any proceedings in a court of justice, interlocutory or final, by which the property of the debtor is seized and diverted from his general creditors. *In re* Rome Planing-Mill (D. C. N. Y.), 3 Am. Br. 123, 96 F. 812. No case has been found construing anything to be meant by legal proceedings other than some proceeding in a court of law or equity."

In some states, including Idaho from whence arose *White v. Stump,* 266 U. S. 310, a judgment lien is obtained by the docketing of a judgment in the proceeding where the judgment was obtained. In some states, no judgment lien results from the judgment. In California, prior to 1927, a judgment became a lien upon the docketing of the judgment in the proceeding. However, in that year the Code of Civil Procedure of the State of California was amended and now a judgment lien can be obtained only by following the procedure outlined in Section 674 of the Code of Civil Procedure of the State of California, namely, by recording an abstract of the judgment in the office of the County Recorder, an office not associated with the courts. Procuring such a lien is by the voluntary and optional act of the party and is not ob-

tained in the litigation wherein the judgment is rendered. It is entirely apart from the legal proceeding itself. So far as the legal proceeding itself is concerned, that proceeding may wend itself to a final conclusion, even though it passes through all the courts, and yet no lien be obtained by the judgment rendered in it.

The Honorable District Judge in the instant case aptly stated in his opinion:

> "Congress, if it so intended, could have said that the trustee would be in the position of a creditor holding a lien whether or not such a creditor actually exists, which would reach every possible lien, judgment or otherwise, but Congress did not do so. It limited the kind of a lien, to be one only obtained by 'legal or equitable proceedings' which is a decided limitation on the kinds of liens, as is readily apparent without illustration."

We think the Court of Appeals was correct when it said in its first opinion (p. 381):

> "The act of recordation is wholly independent of the proceeding leading up to the judgment. The judgment creditor does not need to record the judgment to protect his standing against the debtor or to effect the collection of the judgment. It is wholly within the option of the judgment creditor whether he will take advantage of the statute enabling him to acquire standing against strangers to the judgment by recordation. Thus, the act of recordation is not itself a judicial act, nor so incidental to judicial action as to make a lien obtained in this manner 'a lien by judicial proceedings' within the meaning of Section 70, sub. c."

In regard to our second ground of objection that due force was not given to the decisions of the California courts, in speaking of *Coley v. Hecker,* 206 Cal. 22, 268 Pac. 626, and *Gudger v. Manton,* 21 Cal. 2d 537, 545, 134 P. 2d 217, 222, the Court of Appeals in its original opinion said:

> "Decided cases explicitly distinguish recordation of an abstract of judgment from judicial proceedings under California law."

Following is an excerpt from *Gudger v. Manton, supra,* where the California Supreme Court, at page 545, said:

> "In Coley v. Hecker, *supra,* this court stated that the wrongful recording of an abstract of judgment was not a malicious abuse of process, but rather was a slander of the owner's title in the same category as a forged deed."

In its opinion after rehearing, the Court of Appeals said:

> "Also, we were influenced by the view of the California courts, expressed in a context other than bankruptcy, that the recordation of an abstract of judgment should be distinguished from 'judicial proceedings' under California law. Coley v. Hecker, 1928, 206 Cal. 22, 268 P. 626; Gudger v. Manton, 1943, 21 Cal. 2d 537, 545, 134 P. 2d 217, 222. Of course the view of the California courts, however respected, cannot have the force of law in determining our decision as to the proper construction of language used by Congress in the Bankruptcy Act, but they are suggestive."

This statement appears to be contrary to the usually accepted concept of the various Courts of Appeal, and this Honorable Court, that the presence or absence of a lien

within the intendment of the sections of the Bankruptcy Act in question should be determined by applicable state law.

In the case of *Powers v. Johnson,* 71 F. 2d 48 (C. C. A. 8), the Court of Appeals for the Eighth Circuit had occasion to pass upon the question of the nature of a vendor's lien as to whether it was a statutory lien not subject to nullification or a lien obtained by legal or equitable proceedings that might be nullified by the operation of the Bankruptcy Act. The Court said:

> "We are bound to determine the nature of the lien decreed by the state chancery court in accordance with the Arkansas law (Fisher v. Shropshire, 147 U. S. 133, 13 S. Ct. 201, 37 L. Ed. 109; Farrell v. Wysong (C. C. A. 8th, 40 A. B. R. 740, 246 Fed. 281), and have accordingly examined the pertinent Arkansas decision."

Numerous other decisions might be quoted to the same effect, but the above quotation is a fair example of the holding of the courts on this question.

In respect to Section 3a(3) and Section 67a, we are dealing with existent liens, while with Section 70c, we are dealing with a hypothetical lien. There is, however, added reason to believe that Section 70c looks to the state law as to whether a lien exists by "legal or equitable proceedings."

Section 70c confers on the trustee the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings. The section was enacted after the decision of *York Mfg. Co. v. Cassell,* 201 U. S. 344, primarily in order to confer on the trustee a power to attack secret liens. The draftsman of the act, 45

Cong. Rec. 2277 (1910), said in respect to property in custody of the Bankruptcy Court:

> "First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law."

It has been aptly said that this section confers on the trustee by force of law the status of the ideal creditor, irreproachable and without notice armed *cap-a-pie* with every right and power which is conferred by law of the state upon the most favored creditor who has acquired a lien by "legal or equitable" proceedings.

> *In the Matter of Waynesboro Motor Co.*, 60 F. 2d 668.

The hypothetical status conferred on the trustee must depend for its meaning on a substantive law, not explicitly indicated, but surely must be the state law where the rights of the trustee are being invoked. (Remington on Bankruptcy, 5th Ed., Vol. 4, p. 352.) Its intent is to give to the trustee the status of the most favored creditor of the state as to liens obtained by "legal or equitable" proceedings.

It was not intended by the section to give the trustee greater rights than that of such ideal creditor. The effect, however, of the opinion of the Court of Appeals in this case would do precisely that, for it would give him a lien by legal or equitable proceedings though under the law of the state as defined by the highest courts of the state, he could not acquire a lien by legal or equitable proceedings by the recordation of an abstract of judgment.

IV.

The Court of Appeal Was in Error in Making the Meaning of "Legal or Equitable Proceedings" in Respect to Section 67a and Section 3a(3) the Criterion as to Its Meaning Under Section 70c Particularly as Regards a Proceeding Affecting a Homestead.

For reasons heretofore pointed out, we do not think that a lien obtained by a voluntary recordation of an abstract of judgment in an office disassociated with the courts should be deemed a lien by "legal or equitable proceedings" in respect to any of the sections of the Bankruptcy Act in question. Be that as it may, however, each one of these sections has different purposes to serve. Section 3a(3) has to do with an act of bankruptcy to be used in connection with putting a party into bankruptcy. Section 67a presupposes that bankruptcy has occurred either in connection with Section 3a(3) or some other act of bankruptcy, and has to do with a nullification of liens under certain circumstances. Section 70c has an entirely different purpose. Its primary purpose is to give to the trustees a right to proceed against secret transfers. Each one of these sections is complete in itself. The Court of Appeals stated that if Section 70c stood alone it would adhere to its former decision that a lien by "legal or equitable proceedings" was not accorded the trustee under the facts of this case. It was only because, as the Court saw it, Sections 3a(3) and 67a require that construction that the decision was changed. This Honorable Supreme Court frowned upon reasoning of like nature in:

Citizens Banking Company v. Ravenna National Bank, 234 U. S. 360.

In that case, it was argued that unless Section 3a(3) as it then read was held to require the nullification of a lien before the expiration of four months of the time within which it was obtained, the result would be that in some circumstances the lien will not be dissolved or rendered null through the operation of then Section 67c and 67f, because the full four months would intervene before an act of bankruptcy was committed, and therefore before a petition could be filed. This Court in pointing out that the several sections of the Bankruptcy Act involved are complete in themselves, said, at page 367:

> "The contention to the contrary is sought to be sustained by a reference to Sections 3b, 67c, and 67f. But we perceive nothing in those sections to disturb the plain meaning of Section 3a(3). It defines a particular act of bankruptcy and purports to be complete in itself, as do other subsections defining other acts of bankruptcy. Section 3b deals with the time for filing petitions in bankruptcy and limits it to four months after the act of bankruptcy is committed. It says nothing about what constitutes an act of bankruptcy, but treats that as elsewhere adequately defined. Sections 67c and 67f deal with the retrospective effect of adjudications in bankruptcy, the former declaring that certain liens obtained in suits begun within four months before the filing of the petition shall be dissolved by the adjudication, and the latter that certain levies, judgments, attachments and other liens obtained through legal proceedings within the same period shall become null and void upon the adjudication. Both assume that the adjudication will be grounded upon a sufficient act of bankruptcy as elsewhere defined, and give to every adjudication the same effect upon the liens described whether it be grounded upon one act of bankruptcy

or another. And what is more in point, there is no conflict between Section 3a(3) and the sections indicated. All can be given full effect according to their natural import without any semblance of interference between Section 3a(3) and the others.

"But it is said that unless Section 3a(3) be held to require the extinguishment of the lien before the expiration of four months from the time it was obtained the result will be that in some instances the lien will not be dissolved or rendered null through the operation of Sections 67c and 67f, because occasionally the full four months will intervene before an act of bankruptcy is committed and therefore before a petition can be filed. Conceding that this is so, it proves nothing more than what is true of all liens obtained through legal proceedings more than four months prior to the filing of the petition. And while it may be true, as is suggested, that if the debtor is not restricted to less than four months within which to extinguish the lien there will be instances in which general creditors will be affected disadvantageously, it must be reflected that there also will be instances in which an honest and struggling debtor will be able to extinguish the lien the requisite number of days before a sale or final disposition of any of the property affected and thereby to avoid bankruptcy, without injury to any of his creditors. But with this we are not concerned. The advantages and disadvantages have been balanced by Congress, and its will has been expressed in terms which are plain and therefore controlling."

The Court of Appeals in connection with the argument for consistency in the construction of equivalent phrases point out that if Section 67a included the California judgment lien as a lien obtained by legal or equitable proceed-

ings, and Section 70c excluded it from that interpretation, a California judgment lien, though voidable under 67a, could be preserved by the trustee for the benefit of all creditors as a claim superior to the debtor's subsequently recorded homestead exemption, all leading to a so-called anomalous consequence set forth in the opinion.

The Court in holding that a lien obtained by legal proceedings within four months of bankruptcy could be preserved by the trustee for the benefit of creditors against the debtor's homestead exemption followed *Hemsell v. Rabb,* 29 F. 2d 914 (C. C. A. 5). The writer of this brief recalls that at the time this decision came out in 1929, it occurred to him that said decision was contrary to the decisions of the United States Supreme Court, and on further reflection is convinced of that fact. We have heretofore in this brief referred to the case of *Chicago Burlington & Quincy Railroad Co. v. Hall,* 229 U. S. 511, in which it is made crystal clear that the annulment of a lien obtained by legal proceedings within four months is for the benefit of the bankrupt as to his exemptions as well as to the benefit of the creditors of property which is non-exempt. The purpose of the act is fulfilled when that lien is annulled.

This Court in *First National Bank of Baltimore v. Staake,* 202 U. S. 142, held the preservation clause of Section 67f (now 67a) comes into play only where the property covered by the lien would not pass to the bankrupt or the trustee if the lien were absolutely annulled, as, for instance, to a purchaser under an unrecorded deed. If the property covered by the lien upon the annulment of the lien passes to the trustee as a part of the estate of the bankrupt to be administered in accordance with the

act, namely, to go to the bankrupt if exempt or to the creditors if not exempt, no reason would then exist for use of the preservation clause.

Furthermore, as pointed out in *In re Burden,* 83 Fed. Supp. 416, at page 424, since the *Hemsell v. Rabb* case, *supra,* Section 67a(3) has codified the rule of *Chicago Burlington & Quincy Railroad v. Hall, supra,* by providing that property affected by any lien or transfer voidable under Section 67a(1) and (2) shall pass to the trustee or the debtor as the case may be. Formerly, Section 67f contained a similar provision for the passing of property affected by a voidable lien to the trustee as a part of the bankrupt estate, but in words did not expressly recognize the bankrupt's right to have his exempt property freed of voidable liens.

V.

The Decision in This Case Is Contrary to the Rule of Myers v. Matley, 318 U. S. 622.

If we are right in our contention that the California judgment lien obtained by the voluntary recordation of a judgment in an office separate and apart from the courts, is not a "lien by legal or equitable proceedings" the circumstances of this case as heretofore pointed out in this brief, fall squarely under the rule established by *Myers v. Matley,* 318 U. S. 622, requiring that the homestead be set apart as exempt. The Court of Appeals in its first opinion expressly held that the homestead should be set apart under the ruling of *Myers v. Matley.* We have pointed out what we believe to be error of the Court in its opinion on rehearing—error which led the Court to rule directly counter to the decision of this Court in *Myers v. Matley.*

Conclusion.

This is a case free from any factual controversy but presenting points of law that are of tremendous importance. The erroneous decision of the Court of Appeals in respect to the same will result in far reaching consequences.

We respectfully subit that the Petition for Writ of Certiorari should be granted and the judgment of the Court of Appeals for the Ninth Circuit be reversed.

Dated this 27th day of February, 1952.

Respectfully submitted,

CHARLES K. CHAPMAN,
ALAN E. GRAY,
Attorney for Petitioners.

KYLE Z. GRAINGER,
GRAINGER, CARVER & GRAINGER,
Of Counsel.

APPENDIX.

Pertinent Sections of Bankruptcy Act.

Section 3. Acts of Bankruptcy. a. Acts of Bankruptcy by a person shall consist of his having (3) suffered or permitted, while insolvent, any creditor to obtain a lien upon any of his property through legal proceedings and not having vacated or discharged such lien within thirty days from the date thereof or at least five days before the date set for any sale or other disposition of such property. . . ." 30 Stat. 564 (1898) as amended, 11 U. S. C. (1946).

Section 6. Exemptions of Bankrupts: This Act shall not affect the allowance to bankrupts of the exemptions which are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other state. . . .

Section 67. Liens and Fraudulent Transfers. a.(1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition in bankruptcy or of an original petition under Chapters X, XI, XII or XIII of this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent, or (b) if such lien was sought and permitted in fraud of the provisions of this Act . . . 30 St. 564 (1898) as amended, 11 U. S. C. Sec. 107, (1946) . . . (3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdi-

vision a shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be, except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be. . . . (U. S. C. Title 11, Chap. 7, Sec. 107.)

Section 70. Title to Property. (c) The Trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee, as to all property in the possession or under the control of the bankrupt at the date of bankruptcy or otherwise coming into the possession of the bankruptcy court, shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually exists; and, as to all other property, the trustee shall be deemed vested as of the date of bankruptcy with all the rights, remedies, and powers of a judgment creditor then holding an execution duly returned unsatisfied, whether or not such a creditor actually exists.

(U. S. C. Title 11, Chap. 7, Sec. 110) as such section read at time of inception of within bankruptcy proceedings.

Section 674, California Code of Civil Procedure:

An abstract of the judgment or decree of any court of this State, including a judgment of any court sitting as a small claims court, or any court of record of the United States, the enforcement of which has not been stayed on appeal, certified by the clerk or justice of the court where such judgment or decree was rendered, may be recorded with the recorder of any county and from such recording the judgment or decree becomes a lien upon all the real property of the judgment debtor, not exempt from execution, in such county, owned by him at the time, or which he may afterwards and before the lien expires, acquire. Such lien continues for five years from the date of the entry of the judgment or decree (a) unless the enforcement of the judgment or decree is stayed on appeal by the execution of a sufficient undertaking or the deposit in court of the requisite amount of money as provided in this code, or by the statutes of the United States, in which case the lien of the judgment or decree, and any lien or liability now existing or hereafter created by virtue of an attachment that has been issued and levied in the action, unless otherwise by statutes of the United States provided, ceases, or upon an undertaking on release of attachment, or unless the judgment or decree is previously satisfied, or the lien otherwise discharged. The abstract above mentioned shall contain the following: Title of the court and cause and number of the action; date of entry of the judgment or decree; names of the judgment debtor and of the judgment creditor; amount of the judgment or decree; and where entered in judgment book, minutes or justice's docket.

Section 1237 of the Civil Code of the State of California:

The homestead consists of the dwelling house in which the claimant resides, together with the outbuildings, and the land on which the same are situated, selected as in this title provided.

Section 1238, Civil Code of the State of California:

If the claimant be married, the homestead may be selected from the community property or the separate property of the husband or, subject to the provisions of section 1239, from the property held by the spouses as tenants in common or in joint tenancy or from the separate property of the wife. When the claimant is not married, but is the head of a family, within the meaning of section 1261, the homestead may be selected from any of his or her property. If the claimant be an unmarried person, other than the head of a family, the homestead may be selected from any of his or her property. Property, within the meaning of this title, includes any freehold title, interest, or estate which vests in the claimant the immediate right of possession even though such a right of possession is not exclusive.

Section 1240, Civil Code of the State of California:

The homestead is exempt from execution or forced sale, except as in this title provided.

Section 1241, Civil Code of the State of California:

The homestead is subject to execution or forced sale in satisfaction of judgments obtained:

1. Before the declaration of homestead was filed for record, and which constitute liens upon the premises

* * *

Section 1262, Civil Code of the State of California:

In order to select a homestead, the husband or other head of a family, or in case the husband has not made such selection, the wife, must execute and acknowledge, in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record.

Section 1264, Civil Code of the State of California:

The declaration must be recorded in the office of the recorder of the county in which the land is situated.

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IN THE

Supreme Court of the United States

October Term, 1951
No. 627

CURTISS C. STRAUB and MIRIAM I. STRAUB,

Petitioners,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estates of CURMAR MANUFACTURING COMPANY, a co-partnership, etc., and CURTISS C. STRAUB and MIRIAM I. STRAUB,

Respondent.

ANSWER TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable Fred M. Vinson, Chief Justice and to the Honorable Associate Justices of the Supreme Court of the United States:

Paul W. Sampsell, as trustee in bankruptcy for the Estates of Curmar Manufacturing Company, a copartnership, etc., and Curtiss C. Straub and Miriam I. Straub, respectfully files herewith his Answer and Brief in Reply to the Petition for Writ of Certiorari filed by the Petitioners, Curtiss C. Straub and Miriam I. Straub.

Summary and Short Statement of Matters Involved:

The Petitioners' "Summary and Short Statement of the Matter Involved" might be further shortened as follows:

> After the filing of the voluntary petition in bankruptcy in the District Court of the United States, Southern District of California on February 21, 1948, Petitioners the bankrupts) recorded a Declaration of Homestead covering their California residence. The United States Court of Appeals for the Ninth Circuit, ... F. 2d ....., on December 27, 1951, reversed the Order of the District Judge and affirmed the Order of the Referee in Bankruptcy which refused to set aside the said residence as exempt.

Question Presented:

The Petitioners herein under "Questions Presented" have set forth five queries. We believe the following single question will suffice:

> Under the California Homestead Exemption Statute must the homestead be selected prior to the filing of the bankruptcy proceedings under the theory announced in the case of *Samuel D. White, Trustee in Bankruptcy v. Veta Stump,* 266 U. S. 310, which case concerned the exemptions of an Idaho bankrupt? Or, does the case of *G. E. Myers, Trustee v. Verna May Matley,* 318 U. S. 622, which pertained to the exemptions of a Nevada bankrupt, apply?

These two cases of the Supreme Court of the United States, one in 1924 and the other in 1943, are not in conflict. They do not announce separate, distinct and contravening theories.

The latter case supplements and complements the earlier case. In determining the applicability of one or the other of the said cases to the particular bankruptcy, the exemption statute of the state wherein the bankrupt resides is the controlling factor and as this Court said in *Myers v. Matley:*

> "If the law of Nevada respecting homestead exemptions were like that of Idaho, or operated in the same way, White vs. Stump would be in point."

We will attempt to demonstrate in our attached brief that the homestead exemption statute of California is akin to that of Idaho. It bears nothing in common with the exemption statute of Nevada, with the result that *White v. Stump* applies because the *law of California respecting homestead exemptions is "like that of Idaho and operates the same way."* We will attempt to discuss these two cases of this Court and their application to the instant California Homestead Exemption problem in the attached brief.

Paul W. Sampsell, trustee in bankruptcy, the respondent herein, respectfully prays that the Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

THOS. S. TOBIN,

Attorney for Respondent.

IN THE

Supreme Court of the United States

October Term, 1951.
No. 627

CURTISS C. STRAUB and MIRIAM I. STRAUB,

Petitioners,

vs.

PAUL W. SAMPSELL, as Trustee in Bankruptcy for the Estates of CURMAR MANUFACTURING COMPANY, a co-partnership, etc., and CURTISS C. STRAUB and MIRIAM I. STRAUB,

Respondent.

BRIEF IN RESISTANCE TO PETITION FOR WRIT OF CERTIORARI.

The Supreme Court of the United States has definitely established the legal pattern by which the homestead exemption of the bankrupt may be fixed, ascertained and determined.

Samuel D. White, Trustee in Bankruptcy, v. Veta Stump, 266 U. S. 310, decided in 1924, reversed the determination of the United States Court of Appeals for the Ninth Circuit in *In re Stump,* 284 Fed. 199, and determined that the Idaho bankrupt must select his homestead exemption prior to the filing of the bankruptcy proceeding.

The lower Bankruptcy Court in those states which had exemption statutes like that of Idaho, thereafter refused to set aside to the bankrupt as exempt the homestead where the selection had not been made prior to the filing of bankruptcy.

This Court, in the case of *G. E. Myers v. Verna May Matley,* 318 U. S. 622, in determining that the Nevada bankrupt could select his homestead after bankruptcy, said of its prior decision of *White v. Stump:*

> "White v. Stump, *supra,* involved a homestead exemption claimed pursuant to the law of Idaho, under which the declaration of homestead was required to be executed and acknowledged, like a conveyance of real property, and filed for record. The exemption arose when the declaration was filed and not before. Up to that time the land remained subject to execution and attachment like any other land, and where a levy was effected while the land was in that condition the subsequent making and filing of a declaration neither avoided the levy nor prevented a sale under it. It appeared that no declaration was made and filed of record until a month after Stump's petition and adjudication in bankruptcy. The declaration was then made and filed by his wife for his and her joint benefit. This court held that the Bankruptcy Act fixed the point of time which is to separate the old situation from the new in the bankrupt's affairs as the date when the petition is filed; that when the Act speaks of property which is exempt, and rights to exemption, it refers to that point of time,—namely, the point as of which the general estate passes out of the bankrupt's control and with respect to which the

status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed. The court said:

> 'The exception, as its words and the context show, is not of property which would or might be exempt if some condition not performed were performed, but of property to which there is under the state law a present right of exemption—one which withdraws the property from levy and sale under judicial process.'

Accordingly it was held that, as the claim of exemption was not perfected until after the petition was filed, it was ineffective as against the trustee, as it would have been against a creditor then having a levy on the property. *If the law of Nevada respecting homestead exemptions were like that of Idaho, or operated in the same way, White v. Stump would be in point.* (Italics ours.)

"In conformity to the principle announced in White v. Stump that the bankrupt's right to a homestead exemption becomes fixed at the date of the filing of the petition in bankruptcy and cannot thereafter be enlarged or altered by anything the bankrupt may do, it remains true that, under the law of Nevada, the right to make and record the necessary declaration of homestead existed in the bankrupt at the date of filing the petition as it would have existed in case a levy had been made upon the property. The assertion of that right before actual sale in accordance with State law did not change the relative status of the claimant and the trustee subsequent to the filing of the petition. The federal courts have generally so held and have distinguished White v. Stump where the state law was similar, in terms or in effect, to that of Nevada." (Italics ours.)

The *Myers v. Matley* decision applied the following test to the Nevada exemption statute as propounded in the decision:

> "Our question then is whether, under the constitution and statutes of Nevada, a declaration of homestead would be effective as against a creditor to prevent a judicial sale of the property if made and recorded after levy but before sale thereunder. If it would, it must be equally effective as against the trustee, whose rights rise no higher than those of the supposed creditor and attach at the date of the inception of bankruptcy."

The Respective Homestead Exemption Statutes.

Nevada:

The applicable portion of the Nevada constitution pertaining to the exemption right and the Nevada statute supplementing the same are set forth in this Court's *Myers v. Matley* decision.

California:

The pertinent California homestead exemption statutes are set forth in the appendix attached to the Petition for Writ of Certiorari and Brief in Support thereof now before this Court.

Idaho:

The pertinent Idaho homestead exemption statutes are referred to in this Court's *White v. Stump* decision as follows:

> "The laws of the state of Idaho, where the land is situate, provide for a homestead exemption, but only where a declaration that the land is both occu-

pied and claimed as a homestead is made and filed for record, as therein prescribed. If the family consist of husband and wife, whether with or without children, either may make the declaration. It 'must' be executed and acknowledged like a conveyance of real property, and 'must' be filed for record in the office of the county recorder. The exemption arises when the declaration is filed, and not before. Up to that time the land is subject to execution and attachment like other land; and where a levy is effected while the land is in that condition, the subsequent making and filing of a declaration neither avoids the levy nor prevents a sale under it. Idaho Comp. Stat. 1919, Sections 5441, 5462-5465."

This Court in its *Myers v. Matley* decision points out the distinctions between the exemption laws of Nevada and Idaho.

The homestead exemption statutes of California bear great similarity to that of Idaho.

In both states (Idaho and California):

1. The Declaration of Homestead is required to be executed;
2. And acknowledged;
3. Like a conveyance of real property;
4. And filed for record;
5. The exemption arises only when the declaration is filed and not before;

6. Up to that time (in Idaho), the land has not been "withdrawn" by the bankrupt but remains subject to execution (and attachment) like any other land, and (in California) subject to a judgment lien and thus subject to "levy and sale";
7. The subsequently declared homestead in both states did not avoid the prior judgment lien;
8. In both states the subsequent Declaration of Homestead was ineffective as against the trustee as it would have been against a creditor then having a levy (lien) on the property.

As pointed out by this Court in *White v. Stump*, the date of filing of the bankruptcy proceeding is (direct quotes from the decision):

1. ". . . point of time which is to separate the old situation from the new . . ."
2. ". . . a purpose 'to fix a line of cleavage'"
3. "The hands of the bankrupt and of his creditors are stayed."
4. "His estate passed actually and potentially into the control of the Bankruptcy Court."
5. "When the law speaks of property which is exempt and of rights to exemptions, it, of course, refers to some point of time."
6. "In our opinion this point of time is the one as of which the general estate passes out of the bankrupt's control."
7. ". . . and with respect to which the status and rights of the bankrupt, the creditors, and the trustee in other particulars are fixed."

8. "One common point of time is intended, and that is the date of the filing of the petition."
9. And as the test of exempt property . . . "is not of property which would or might be exempt if some condition not performed were performed."
10. ". . . but of property to which there is, under the state law, a present right of exemption."
11. ". . . one which withdraws the property from levy and sale under judicial process."

In *Myers v. Matley* (last paragraph of the said decision after commenting upon the above principles, announced in its *White v. Stump* decision) this Court held that:

> "Under the law of Nevada the right to make and record the necessary Declaration of Homestead existed in the bankrupt at date of the filing of the petition as it would have existed in case a levy had been made upon the property. The assertion of that right before actual sale in accordance with State law did not change the relative status of the claimant and the trustee subsequent to filing of petition."

This Court in its *Myers v. Matley* decision called attention to the theory of the present Bankruptcy Act and pointed out that bankruptcy has the force and effect of a levy of an execution for the benefit of creditors and further that the trustee is vested not only with the title of the bankrupt, *but clothed with the right of an execution creditor with a levy on the property which passed into the trustee's custody.* However, the application of this rule to the Nevada bankrupt did not take away from him the right to subsequently make and record the Declaration of Homestead inasmuch as the bank-

rupt, under the Nevada law, had the right to make such selection even though there had been a levy made upon the property, and at anytime before the actual sale thereunder.

This was so because under Section 70c of the Bankruptcy Act, as to the real property in question in possession of the bankrupt, the trustee was deemed to have vested in him as of the date of bankruptcy, all of the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings, whether or not such a creditor actually existed. As against the selection of the homestead after bankruptcy by the Nevada bankrupt, this overall statute, "rights, remedies and powers" of the trustee would not defeat the bankrupt's said subsequent selection of the homestead. This result must of necessity follow because the statutory rights of the trustee, being equivalent to those of a creditor holding a lien on the property, would not defeat the subsequent selection of the Nevada homestead.

This is not so, however, in Idaho or in California or in states with similar exemption statutes. The bankrupts, Curtiss C. Straub and Miriam I. Straub, the Petitioners herein, contend that their trustee in bankruptcy does not and never could, occupy the status, as established in Section 70c of the Bankruptcy Act, of a creditor with a lien upon their real property by legal or equitable proceedings. And further, that since in California a judgment lien is acquired by the recordation of the abstract of judgment under the provisions of Section 674 of Code of Civil Procedure of the State of California, that this act of recordation of the abstract of judgment is so foreign to the said statutory rights given to the trustee as to make the lien not a lien acquired by "legal proceedings."

Rights of Trustee Under Section 70c:

Congress has directed (Section 70c of the Bankruptcy Act) that as to property of the bankrupt, the trustee:

> "Shall be deemed vested as of the date of bankruptcy with all the rights, remedies and powers of a creditor then holding a lien thereon by legal or equitable proceedings . . ."

These extensive rights, remedies and powers were not sufficient, when held by the trustee of the Neveda bankrupt, to defeat the subsequent selection of the homestead, inasmuch as *an actual levy by a creditor would not suffice to stop the selection.* (*Myers v. Matley, supra.*)

The result is otherwise with respect to the Idaho bankrupt, for as said in *White v. Stump,* upon filing of the bankruptcy proceeding, it is then that the "rights of the bankrupt, the creditors and the trustee are fixed," there the trustee, being equipped with the same position as a creditor with a lien on the property by legal proceedings, stood in a position to defeat the subsequent selection of the homestead. The trustee in Idaho by selecting a most *inferior* lien position, *i. e.,* an attachment lien, prevented the subsequent selection.

Rights, Remedies and Powers.

The trustee occupies not only the said hypothetical lien position, but also had all of the "rights, remedies and powers" of the lien creditor. These are not restrictive designations. If, under the mandate of Congress, the trustee has the "remedy" (or power or right) of a creditor who then holds a lien on the property, we ask: *How can he be stopped short of an actual lien status?*

In referring to the trustee's status under Section 70c of the Bankruptcy Act (formerly Section 47a(2)), the United States Court of Appeals for the Ninth Circuit calls attention to the fact in *Pacific State Bank v. Coats,* 205 Fed. 618, that the purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings *favored by the varying registration laws* of each of the states.

Later the same Court stated in 1914 in the case entitled *In re Lane Lumber Company, Limited (Boyd v. Wall),* 217 Fed. 550 (at p. 552) that the said section conferred . . .

> "the power, upon the trustee, in the interest of the general creditors, to contest the sufficiency of any claimed lien, pledge, or security that *'a lien creditor* or a judgment creditor might challenge had bankruptcy not intervened.'" (Italics ours.)

Also, in the case of *Scandinavian-American Bank v. Sabin,* 227 Fed. 579, the same Court said at page 581 that the trustee under the said statute:

> "may make any objection that a creditor *holding a lien might make.*" (Italics ours.)

In other words as in *Myers v. Matley,* we must first place the trustee in the shoes of a creditor *holding* a lien on the property and thus ascertain the relative potency of his position.

Decision of the United States Court of Appeals for the Ninth Circuit, December 27, 1951.

When the within case was determined by the United States Court of Appeals for the Ninth Circuit, the decision turned upon the answer to the single question:

> *Inasmuch as a judgment lien defeats a subsequent Declaration of Homestead in California, does the trustee under Section 70c occupy such a status?* (Having in mind the fact that under the California statute (Code of Civ. Proc., Sec. 674) the judgment lien attaches upon the recording of the abstract of judgment.)

The Petitioners here, pressed the point before the United States Court of Appeals that the lien thus acquired by trustee was not a "lien by legal proceedings" and further that the trustee's right must stop short of the actual lien (although the Bankruptcy Act states *"then"* holding a lien). They argue that although the trustee had the "right" and the "remedy" and the "power" of a lien creditor, that he would nevertheless be held "lienless" or, without any of the rights, remedies and powers of a lien holder.

The lower court in its decision of December 27, 1951, denied Petitioners' contentions and held that the California judgment lien perfected by recordation of the abstract "is a lien by 'legal or equitable proceedings'" within the meaning of Section 70c.

Creditor Then Holding a Lien:

Throughout the years the Courts, both Federal and State, have carried out the direction of Congress and have given without restraint, these powers to the trustee under Section 47a(2) and later under Section 70c. The following cases demonstrate the concern which the Courts have shown:

Big Four Implement Co. et al. v. Wright (8th Cir., 1913), 207 Fed. 535:

"The lien which the trustee is considered as holding must be a lien *attaching* as of that date (time of bankruptcy)." (Italics ours.)

Pacific State Bank v. Coats (In re Raymond Box Company et al.) (9th Cir., 1913), 205 Fed. 618. Appeal from U. S. District Court, Washington:

"It is the purpose of this amendment (to Section 47a(2) adopted June 25, 1910) to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or *holding liens* upon the property coming into his custody by a legal or equitable proceedings . . . but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings." (Italics ours.)

Matter of Seward Dredging Company, Bankrupt (2d Cir., 1917), 242 Fed. 225:

"In this case the trustee having surveyed the list of possible creditors of the bankrupt capable of exercising legal or equitable proceedings has chosen the position of an attaching creditor as being most favorable to his contention."

Corey v. Blackwell Lumber Co., et al. (1913), Idaho S. Ct., 135 Pac. 742:

"The effect of said amendment is that the trustee may now challenge any security or conveyance that a lien or judgment creditor might have challenged had bankruptcy not intervened."

Southern Dairies, Inc., v. Banks (4th Cir.), 92 F. 2d 282:

"As said in the Senate Judiciary Committee Report to which we have referred (Report No. 691, Senate Judiciary Committee, 61st Congress, the effect of the 1910 amendment to 47a(2)):

'. . . that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other *lien* by legal or equitable proceedings *levied* upon that property would have under State law.'" (Italics ours.)

In re Farmers' Cooperative Co. of Barlow, N. D., District Court of North Dakota, 1913, 202 Fed. 1008 (This case is cited by Judge Paul J. McCormick in *White, trustee v. Pacific S. W. Trust & Sav. Bank*, 9 F. 2d 650):

"It simply enables the trustee, as the representative of creditors, to assert the same rights which the creditors themselves would have possessed had bankruptcy itself not intervened."

Ashbaugh, as Receiver of First National Bank v. Becker, 14 Fed. Supp. 464, U. S. District Court, Eastern District of Michigan. Decision by Judge Tuttle:

In commenting upon Section 14618 of Michigan Compiled Laws of 1929, which held that no levy

by execution on real estate shall be valid against bona fide conveyance made subsequent to such levy, until a notice thereof, containing the names of the parties, etc., shall be filed in the office of register of deeds, etc. . . .

"It will be noted that if the trustee in bankruptcy were entitled *only* to the rights of a judgment creditor holding an execution, *but not shown to have filed said notice as prescribed by said statutes,* he would not be entitled to the rights of a lien creditor under Section 47a . . . As, however, the trustee in bankruptcy herein is now shown to be vested with the rights of a creditor holding an execution lien, such trustee, must, for the purposes of the present case, be deemed to have complied 'with all of the requirements prescribed by the Michigan statute just quoted as necessary to the acquisition of such a lien, including the filing of the notice so prescribed.'" (Italics ours.)

White, Trustee v. Pacific Southwest Trust & Savings Bank, et al., U. S. District Court, Southern District of California (by Judge Paul J. McCormick, 1926), 9 F. 2d 650:

"The verbiage 'vested with all the rights, remedies and powers' of a judgment creditor, does not mean 'the rights, remedies and powers' of a judgment creditor who would not have been entitled under the statutes of California (section 409, Code of Civil Procedure) to file a *lis pendens,* but includes such a judgment creditor."

In the Matter of Charles E. Toms, Bankrupt (6th Cir., 1939), 101 F. 2d 617:

"Under Section 47a as amended—(11 U. S. C. A., Sec. 75a)—his rights are to be determined as though he were a creditor holding a lien by legal or equitable proceedings at the time the petition is filed, if property is in possession of bankrupt or trustee."

In re Duker Ave. Meat Market (6th Cir., 1924), 2 F. 2d 699:

"He has whatever rights any and all creditors could under the State Law have obtained by legal or equitable proceeding before bankruptcy."

Collier on Bankruptcy (14th Ed.), Vol. 4, in analyzing Section 70c, starting at page 1252, has the following to say on the subject:

In a note explaining the amendment (Act of June 25, 1910) its draftsmen wrote:

"It is evident that in the proposed amendment attempt is made to give effect to two ideas, quite distinct: FIRST, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceedings levied upon that property would have under state law; . . . In this way, in effect, proceedings in bankruptcy will give to creditors the same rights that creditors under the state law would have had had there been no bankruptcy, and from which they are debarred by the bankrupt—certainly a very desirable and eminently fair position to be granted to the trustee. (45 Cong. Rec. 2277 (1910).)"

At page 1261:

"It has been said quite aptly that this provision confers upon the trustee 'by force of law' the status of the 'ideal creditor, irreproachable and without notice, armed Cap-A-Pie with every right and power which is conferred by the law of the state upon its most favored creditor who has acquired a lien by legal or equitable proceedings."

At page 1263:

"Therefore, the trustee's powers, in every case governed by this portion of section 70c, are those which the state law should allow to a supposed creditor of the bankrupt who had, at the date of bankruptcy, completed the legal (or equitable) processes *for perfection of a lien* upon all the property in either the bankrupt's or the court's possession or control. *Thus if under the state law a creditor asserting a lien by virtue of legal proceedings must file certain notices thereof, the trustee will be deemed to have complied with such requirements.*" (Italics ours.)

Remington on Bankruptcy, Vol. 4, page 359:

"A trustee, by virtue of his statutory position as creditor with a lien by legal or equitable proceedings, was held to have a lien superior to the lien of a Federal judgment not recorded under state law till after bankruptcy."

At page 361:

"The trustee may select as the basis for his claim whatever kind of lien available by legal or equitable proceedings which will give him the greatest rights. Commercial Credit Co. v. Davidson, 112 F. 2d 54."

In referring to the rights of the trustee at the time of the 1950 amendment to Section 60 and Section 70c, the report of the Judiciary Committee of the House of Representatives states (H. R. Report No. 1293, Aug. 22, 1949, 81 Cong., 1st Sess.):

> "In view of the amendment made to Section 60a, as well as intrinsically, it is deemed wise to place the trustee in bankruptcy in the position of a lien creditor with respect to all of the bankrupt's property, and Section 2 of the bill so amends Section 70c . . .
>
> "It follows that from these general principles, as well as from the basic provisions of the Bankruptcy Act itself, that
>
> "(a) *A trustee in bankruptcy occupies the position of a 'universal' judgment or lien creditor with all of such a creditor's rights, remedies and powers.*
>
> "The said amendment to Section 70c is not important here, but *it* again increases the rights, powers and remedies of the trustee by giving to him *lien rights on property* of the bankrupt whether or not in possession." (Italics ours.)

California Homestead Exemption:

The case of *Yager v. Yager*, 7 Cal. 2d 213, cited by Petitioners is no doubt the leading California Supreme Court case upon the subject of homesteads. It states at page 217:

> "A Declaration of Homestead may be filed during the pendency of litigation, at any time before the judgment has become a lien upon the property."

Far-reaching Effect of the Decision.

Petitioners point out in their petition herein at page 14 that:

> "The decision is far reaching in that the construction given to the meaning of Section 70c by the Court of Appeals will nullify the rights of homestead exemptions given debtors under the law of California and states having similar laws, all contrary to the intent of Congress that the Bankruptcy Act shall not affect the allowance to the bankrupt of the exemptions prescribed by the laws of the different states. This will affect untold numbers of homes of families presumably protected by these homestead laws and the Acts of Congress."

However, the lower Federal Courts and Referees in Bankruptcy in California have followed this Court's *White v. Stump* decision ever since 1924 or for twenty-eight years and have refused to set aside to the California bankrupt the homestead which was not selected prior to bankruptcy.

We ask the Petitioners to point out one California case of a California bankrupt which has not followed *White v. Stump* since it was decided by this Court.

Petitioners assert that this long standing rule should be abrogated and that this Court's decision of *Myers v. Matley* should now permit the California bankrupt to select his homestead exemption after bankruptcy.

Petitioners refer to the fact that the decision of the United States Court of Appeals for the Ninth Circuit "made Section 70c a sword to be used against the exemption rights contrary to the purpose of the Bankruptcy Act." The sword, we submit, rests in the hands of the

bankrupt. Congress has permitted the bankrupt to cleave out of his assets an exemption before his creditors may have recourse thereto. Correspondingly, it has placed in the hands of the trustee, as the representative of the creditors, a shield in the form of Section 70c with which he can protect those assets unless the exemption selection is seasonably made.

The Test Heretofore Established by This Court:

We believe that the intended application of Section 70c should be upon the following basis:

1. It must be kept in mind that it, as is the Bankruptcy Act itself, is of uniform application through the different states;
2. It gives to the trustee in the different states the rights, remedies and powers which any creditor who then *held* a lien by legal proceedings upon the property of the bankrupt in the particular state would have.

To make the test under the said Section, Congress puts the trustee in the same position as could be occupied by a creditor in the state of the bankrupt, who then *held* a lien by legal proceedings on the property.

This Court in *White v. Stump* followed the dictate of Congress and as to the Idaho trustee therein found that the trustee defeated the subsequent selection of the homestead by the Idaho bankrupt.

The same identical test was applied to the Nevada bankrupt by this Court in the *Myers v. Matley* decision and gave full recognization to these rights, remedies and powers, but held that their full application would

not prevent the selection by the Nevada bankrupt of the exemption after bankruptcy.

The United States Court of Appeals for the Ninth Circuit, in the pending matter applied the same identical tests and determined that the rights, remedies and powers of the California trustee defeated the subsequent selection.

Petitioners' argument, that the rule laid down by *White v. Stump* has been changed or qualified by *Myers v. Matley,* has been answered with no uncertain words by the Fourth Circuit in the case of *Palais, Trustee, v. DeJarnette, et al.,* 145 F. 2d 953:

> "The controlling rule was stated with crystal clearness in *White v. Stump* (1924), 266 U. S. 310, 312, 45 S. Ct. 103, 69 L. Ed. 301:
>
> " 'The Bankruptcy Law does not directly grant or define any exemptions, but directs, in Section 6 . . . that the bankrupt be allowed the exemptions "prescribed by the state laws in force at the time of the filing of the petition"; in other words, it makes the state laws existing when the petition is filed the measure of the right to exemptions.'
>
> "Counsel argues that Myers v. Matley (1943), 318 U. S. 622, 63 S. Ct. 780, 87 L. Ed. 1043, has changed the rule laid down in the Stump case. *With this we cannot agree.* There the Supreme Court distinguished the Stump case on the facts alone. In the plainest of language it approved the doctrine of the Stump case. The rights of the bankrupt are fixed as of the date of adjudication. Georgouses v. Gillen (C. C. A., 9th Cir., 1928), 24 F. (2d) 292." (Italics ours.)

We do not agree with Petitioners' bombastic statement that:

> "A judgment lien perfected only by voluntary optional recordation in a office apart from the Courts is not a lien by a 'legal or equitable proceedings' within the meaning of 70c of the Bankruptcy Act or within the meaning of Sections 3a(3) and 67a of the Bankruptcy Act."

The decision of the Ninth Circuit fully disposes of the said contention, and while we do not wish to unnecessarily extend our answer herein, we propose the following questions, which will demonstrate the straight jacket into which Petitioners would place the California trustee in bankruptcy:

1. How could the trustee receive the protection of Section 67a and set aside the judgment lien (*i. e.*, the lien which secured by legal proceedings under Section 67a(1)) upon the insolvent bankrupt's property which was secured the day before bankruptcy?

Under the Petitioners' theories, this could not be done inasmuch as the creditor's judgment lien (which was actually and not hypothetically on the bankrupt's property) could not be set aside because, Petitioners argue, it was not a "lien by legal proceeding," but rather by the extra-judicial act of recording the abstract.

2. How could creditors assert an act of bankruptcy against a California bankrupt under Section 3a(3) (while insolvent, obtain a lien upon his property through legal proceedings, etc.) if it is held that the judgment lien by recorded abstract is not a "lien by legal proceeding"?

The Bankruptcy Law Is Superior to All State Laws on the Subject:

This principle was laid down many years ago in *Globe Bank & Trust Co. v. Martin,* 236 U. S. 288. In that case this Court said:

> "With attachments and liens thus acquired under state laws, the Bankruptcy Act dealt in provisions which were superior to all State laws upon the subject, in virtue of the constitutional authority of Congress to enact a uniform system of bankruptcy. Re Watts, 191 U. S. 1, 27, 57 L. Ed. 933, 941; First National Bank v. Staake, 202 U. S. 141."

This rule was reiterated by this Court in *Moore v. Bay,* 284 U. S. 4, in the following language:

> "The Circuit Court of Appeals affirmed an Order of the District Judge giving the mortgage priority over the last creditors. Whether the Court was right must be decided by the Bankruptcy Act since it is superior to all state laws upon the subject." (Citing the case of *Globe Bank & Tr. Co. v. Martin,* 236 U. S. 288.)

Answer to Argument of Petitioners That Trustee Cannot Under Section 70c Have Status of Creditor Holding a Lien by Legal Proceeding:

With respect to the California cases of *Coley v. Hecker,* 206 Cal. 22 and *Gudger v. Manton,* 21 Cal. 2d 537, the United States Court of Appeals for the Ninth Circuit in its decision of December 27, 1951, says:

> "Of course the views of the California courts, however respected, cannot have the force of law in determining our decision as to the proper construc-

tion of language used by Congress in the Bankruptcy Act, but they are suggestive.

"On the other hand, the lien obtained by recording an abstract of judgment is described as a judgment lien. The California statute provides that a 'judgment or decree becomes a lien' upon the filing of the abstract. Code of Civil Procedure, Section 674. And while recordation is an independent step in the sense of being something voluntary beyond the entry of judgment, it is incidental to the judicial proceeding in the sense of a device to give a judgment particular additional effect. The judgment is the basic and fundamental source of rights whether generally before recordation or by way of lien after recordation."

Respectfully submitted,

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